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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVID MULLICAN, Plaintiff and Respondent, v. CITY OF ONTARIO et al., Defendants and Appellants.	E035001 (Super.Ct.No. RCV065835) OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Reversed.

Filarsky & Watt, Steve A. Filarsky, for Defendants and Appellants.

Lackie & Dammeier, Michael D. Lackie and Michael A. Morguess, for Plaintiff and Respondent.

Defendant and appellant, the City of Ontario (the City) appeals from the trial court's order granting a motion for attorney fees in favor of plaintiff and respondent David Mullican (plaintiff).

Plaintiff was a police detective for the City. The police department terminated plaintiff's employment for allegedly making false statements to his superiors about an investigation. After administrative proceedings upheld the termination, plaintiff filed a writ of administrative mandate in the superior court under Code of Civil Procedure,[1] section 1094.5. The trial court granted the writ on the ground that plaintiff's superiors unlawfully searched his desk and unlawfully interrogated him, in violation of the provisions of the Public Safety Officers Procedural Bill of Rights Act (the Act), under Government Code section 3300 through 3311. The evidence produced as a result of the search was the only substantial evidence of plaintiff's untruthfulness. Because it deemed the search unlawful, the court suppressed the evidence, reversed the administrative determination, and ordered plaintiff reinstated. The City appealed. We affirmed the judgment granting the writ in an unpublished opinion dated April 22, 2004, case number E033931. We hereby take judicial notice of our previous unpublished opinion in this case.

Plaintiff filed a motion for attorney fees under section 1021.5, which the court granted. For the reasons set forth below, we hold that the trial court erred in granting plaintiff's motion for attorney fees and reverse that order.

FACTUAL AND PROCEDURAL HISTORY

A detailed statement of facts is provided in the unpublished opinion in case number E933931, as follows:

"Plaintiff had been a police officer for the City's police department for 20 years. At the times relevant here, he was a detective assigned to a burglary investigation unit. On or about September 9, 1999, a citizen, Paul Gardner, reported an alleged embezzlement from his business. The case was assigned to plaintiff for investigation.

"In approximately May of 2000, Gardner inquired about the status of the case. Plaintiff's supervisor, Sergeant Mendez, responded to Gardner's inquiry by asking plaintiff for his assigned open cases, derived from the police department's computerized tracking printout. At that time, plaintiff realized the case had been overlooked, and he began work on the case. The Gardner investigation was closed and referred to the district attorney for prosecution in June or July of 2000.

"On August 3, 2000, Sergeant Mendez was apparently still concerned about the Gardner case, even though the case had by then been completed and closed. He wrote a memorandum to plaintiff, asking a series of questions about the Gardner investigation. Sergeant Mendez's memorandum asked plaintiff to respond in writing to these questions. Sergeant Mendez asked, for example, why plaintiff had not attempted to actually recover the embezzled property (auto parts) from the suspect, the whereabouts of plaintiff's notes, and why plaintiff had not interviewed certain witnesses. In addition, Sergeant

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1 All statutory references are to the Code of Civil Procedure unless otherwise specified.

Mendez asked for an explanation of the delay in following up the case. Plaintiff was required to respond by 5:00 p.m. the following day.

"Plaintiff attempted to invoke the Act to consult a representative of his choice before responding to Sergeant Mendez's memo.[2] His request was refused. He replied to Sergeant Mendez's memo as ordered. Plaintiff's reply explained that he had searched his files and had 'no indication that I received and/or ever worked on the original arrest.' Plaintiff had been prompted to review his 'caseload' in March, when the victim inquired about the status of his case. Plaintiff then promptly began his follow-up investigation. Plaintiff indicated that the victim had decided to seek restitution rather than recovery of the stolen property. Plaintiff had reinterviewed certain witnesses. Plaintiff's attempts to contact the suspect (a former employee of the business) had been fruitless. Plaintiff then obtained an arrest warrant; the suspect surrendered in July of 2000, and the case was referred for prosecution.

"On August 23, 2000, approximately one hour before plaintiff was due to arrive at work, Sergeant Mendez went to plaintiff's desk. He picked up a folder containing plaintiff's case log sheets for the year 2000. The folder was on a shelf on top of the desk. Sergeant Mendez then opened a drawer of the desk; he found a similar folder containing case log sheets in plaintiff's handwriting for the year 1999. On one of the pages of the 1999 case log, Sergeant Mendez found an entry in plaintiff's handwriting noting that

plaintiff had received the Gardner case in September of 1999. Sergeant Mendez photocopied this page of plaintiff's 1999 case log, and replaced the log in the desk drawer.

"In the afternoon of August 23, Sergeant Mendez asked plaintiff for his 1999 case log. Plaintiff said he would look for it. A short time later, Sergeant Mendez saw plaintiff leaving the building with a stack of papers in his hand. Sergeant Mendez again asked for plaintiff's 1999 case log. Plaintiff said that he did not have it, and that it must be at his home.

"Several days elapsed. Plaintiff did not produce the log. Meanwhile, on August 29 or 30, Sergeant Mendez had again looked in plaintiff's desk drawer. The 1999 case log was no longer there.

"After the second search, on September 11, 2000, Sergeant Mendez wrote a memorandum to plaintiff reminding plaintiff that he had still not received plaintiff's log. He directed plaintiff to produce the case log, or submit a memorandum answering five specific questions concerning the location of the log, and keeping work files at home.

"Plaintiff responded that he did not have any police files at home, except for attorney communiqués. He stated that he had looked for his 1999 case log, but he 'generally clear[ed] out' his case logs early in the new year. Consequently, plaintiff stated, 'if I had any [case logs] at all, I didn't think [they] went back into 1999.'

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2 See Government Code section 3303, subdivision (i), allowing officers to be represented by a representative of their choice before answering questions which have the

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"On September 12, 2000, Sergeant Mendez required plaintiff to respond to another memorandum. He asked for plaintiff to produce the 1999 case log if it was in his possession; if it was not, Sergeant Mendez asked plaintiff to report what had happened to the log, and, if it had been destroyed, why and when this was done. Plaintiff answered that, 'I do not currently have my 1999 case log.' He noted that there was no departmental regulation requiring the detectives to use or keep a case log manifest and indicated that '[m]ost of the information it contains and/or is needed on a daily basis is currently available on the electronic report systems we have in our computers.' Plaintiff stated that, to the best of his recollection, he had finished using the 1999 log in March or April and had placed it with other departmental documents to be shredded.

"Sergeant Mendez believed that plaintiff had been untruthful in his statements about what had happened to the case log. He referred the matter for an internal affairs investigation.

"In October of 2000, the internal affairs division initiated an investigation into the matter. Plaintiff was informed of the general nature of the accusation**:** that is, that he had been untruthful in his 'responses to Sgt. Mendez, who was conducting an inquiry into your caseload and your job performance.' The internal affairs memorandum advised plaintiff of his right under the Act to representation during questioning. During his internal affairs interview, plaintiff maintained that he had truthfully answered Sergeant Mendez's inquiries about the 1999 case log. When confronted with the photocopied page

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potential to lead to punitive action.

of his 1999 case log, plaintiff reiterated that he had placed the case log to be shredded sometime between March and May of 2000, and that he did not know how it could have been in his desk on August 23.

"Plaintiff was placed on administrative leave and notified of the intent to terminate him. Plaintiff requested a *Skelly* hearing[3] with the chief of police. The police chief denied plaintiff's disciplinary appeal and terminated plaintiff, effective January 16, 2001.

"Plaintiff sought administrative review of his termination before the city manager. The city manager upheld the termination. Plaintiff then took the matter to advisory arbitration. Plaintiff and other witnesses testified at the arbitration hearing. The arbitrator also upheld the termination. The city council accepted the arbitrator's recommendation.

"Plaintiff then filed the instant action for administrative mandate. Plaintiff argued that Sergeant Mendez's memorandum of August 3, 2000 was an 'interrogation' which could subject plaintiff to discipline, and therefore plaintiff should have been afforded his right under the Act to representation.[4] Plaintiff further argued that Sergeant Mendez's searches of plaintiff's desk drawer violated Government Code section 3309, which provides that, '[n]o public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a

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[3] *Skelly v. State Personnel Bd*. (1975) 15 Cal.3d 194.

search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.'

"A key question here [was] whether the desk drawer was 'other space for storage . . . assigned to [plaintiff].' The trial court found that it was, and that Sergeant Mendez's search of the desk drawer violated plaintiff's statutory rights under the Act. Once Sergeant Mendez had searched the desk and photocopied a page from the 1999 case log, the court found that any further questioning, by memorandum or otherwise, was not 'routine' or normal communication, but was questioning or interrogation about matters for which discipline could be imposed. Thus, under Government Code section 3303, plaintiff should have been informed of the nature of the investigation and afforded his right to representation during interrogation.

"The trial court determined that the appropriate remedy for violations of the Act was suppression of the photocopied page obtained during the search, and of plaintiff's statements thereafter. In the absence of the photocopied document and plaintiff's statements, there remained no evidence to support a finding that plaintiff had been untruthful. The court therefore granted judgment in favor of plaintiff, and issued the administrative writ, commanding that plaintiff be reinstated." (*Mullican v. City of Ontario* (April 22, 2004, E033931) [nonpub. opn.] at pp. 2-8.)

The City appealed. We held that "[t]he trial court did not abuse its discretion in determining that plaintiff's rights under section 3309 of the Act had been violated, or in

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4 Government Code section 3303, subdivision (i).

suppressing the evidence seized as a result of the unlawful search of the desk drawer. [Therefore,] [p]laintiff's interrogation rights under Government Code section 3303, subdivision (c) were also violated**,** and suppression [was], under the circumstances, an appropriate remedy for this violation as well." (*Mullican v. City of Ontario*, *supra*, [nonpub. opn.] at p. 31.)

In the interim, plaintiff filed a motion for attorney fees under section 1021.5 of the Code of Civil Procedure (section 1021.5). The trial court granted plaintiff's motion and awarded attorney fees in the amount of $13,050.00. The City appeals.

ANALYSIS

I. The Trial Court Erred in Granting Plaintiff's Motion for Attorney Fees

The sole issue on appeal is whether the trial court properly granted plaintiff's motion for attorney fees under section 1021.5.

Section 1021.5 authorizes an award of attorney's fees to a party if (1) the party was "successful"; (2) the party's action "has resulted in the enforcement of an important right affecting the public interest"; (3) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons"; (4) "the necessity and financial burden of private enforcement are such as to make the award appropriate"; ***and*** (5) "such fees should not in the interest of justice be paid out of the recovery, if any." (§ 1021.5.)

"'Section 1021.5 codifies the "private attorney general" doctrine under which attorney fees may be awarded to successful litigants. [Fn. omitted.] "The doctrine rests

upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]" [Citation.] . . .' In short, section 1021.5 acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring. [Citations.]" (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 511.)

"The decision as to whether an award of attorney fees is warranted rests initially with the trial court. (Citation.) . . . . [¶] . . . Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. '"To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . ."' [Citation.] However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate "where no reasonable basis for the action is shown." [Citation.]' [Citations]." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143 (*Baggett*).)

In this case, the City contends that "[t]he only benefit in this case was solely to [plaintiff,]" and that there was no public benefit, which is a requirement under section 1021.5. We agree. Here, plaintiff filed this instant action against the City with one

purpose – to be reinstated as an officer. Plaintiff's action in no way sought to create a significant benefit to the general public.

Nonetheless, plaintiff argues that "[t]he benefit goes beyond [plaintiff] himself[,]" because "'tranquil relations between peace officers and their departments are matters of important and substantial concern to every citizen of the state.' [Citation.]" However, plaintiff's argument does not address the "public benefit" requirement set forth under section 1021.5. Although peaceful relations between police officers and their departments may be matters of public concern, we simply fail to see how plaintiff's action seeking enforcement of the Act by the City benefited the general public.

In support of its argument, plaintiff relies on *Baggett*, *supra*, 32 Cal.3d 128. *Baggett*, however, is distinguishable. In *Baggett*, the issue was whether the Act applied to chartered cities. (*Id*. at p. 131.) The plaintiffs in *Baggett* were police officers employed by the Los Angeles Police Department (LAPD). They filed suit against the chief of police, the board of police commissioners and the City of Los Angeles. (*Ibid*.) The plaintiffs were investigated for alleged misconduct during work hours. (*Id*. at p. 132.) After the investigations were conducted, no formal charges were filed against the plaintiffs. However, under LAPD's regulations, the plaintiffs were reassigned to lower-paying positions. (*Id*. at p. 133.) Seeking to prevent their reassignment, the plaintiffs filed suit. They contended that the defendants could not reassign them to lower paying positions without affording them an administrative appeal as provided under the Act. (*Id*. at pp. 133-134.) The trial court granted the relief requested by the plaintiffs, but denied

their motion for attorney fees. (*Id*. at p. 134.) The defendants appealed from the judgment, and the plaintiffs appealed from the trial court's denial of their motion to recover attorney fees under section 1021.5. (*Ibid*.)

The court of appeal discussed the purpose of the Act in detail. Thereafter, it held that the Act "may constitutionally be applied to charter cities." (*Baggett*, *supra*, 32 Cal.3d at p. 140.) The court then went on to determine whether the trial court abused its discretion in denying the plaintiff's motion for attorney fees. The court concluded "that there was no reasonable basis for the trial court's denial of their motion for attorney fees [because the plaintiff's] action resulted in securing for themselves and many others the basic rights and protections of the Bill of Rights Act." (*Id*. at p. 143.)

Baggett is wholly distinguishable from this case. Here, plaintiff only sought to enforce the Act, which was already applicable to the officers employed by the City, for his own benefit. There was nothing in this action that conferred any additional benefits to other police officers other than those already afforded to them under the Act. In *Baggett*, the officers sought the applicability of the Act to all officers employed by Los Angeles, a chartered city. When the court found that the Act may be applied to charter cities, it conferred a benefit upon all LAPD officers. Therefore, plaintiff's reliance on *Baggett* is not helpful.

Moreover, we recognize that, because the public has a significant interest in seeing that laws, such as the Act, are enforced, actions seeking enforcement of laws always derives some benefit when illegal conduct is rectified. Nevertheless, the Legislature did

not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitutional or statutory right. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939 (*Woodland Hills Residents Assn.*); and *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 319, fn. 7 (*Press*).) The plain language of the statute specifically provides for an attorney fees award only when the lawsuit conferred a "significant benefit" on "the general public or a large class of persons."

When the record indicates that the primary effect of a lawsuit is to advance or vindicate a plaintiff's personal economic interest, such as plaintiff's action, an award of fees under section 1021.5 has been deemed improper. (*Press*, *supra*, 34 Cal.3d at pp. 319-320, fn. 7; *Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 167 (*Pacific Legal Foundation*).) "Section 1021.5 was not designed as a method of rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." (*Beach Colony II v. California Coastal Comm.* (1985) 166 Cal.App.3d 106, 114.) "Instead, its purpose is to provide some incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate." (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 80.)

In *Pacific Legal Foundation*, the plaintiffs successfully challenged a condition imposed on a permit by the California Coastal Commission. The Supreme Court held that the plaintiffs were not entitled to attorney fees under section 1021.5 because their

lawsuit, while based on the constitutional right to be free from the arbitrary deprivation of private property vindicated only their own personal rights and economic interests, and did not confer a significant benefit on a large class of persons. The court rejected the argument that the decision represented a "ringing declaration" of the rights of other landowners in the coastal zone, or would lead to the Commission's abandoning its "prior unconstitutional practices." (*Pacific Legal Foundation*, *supra*, 33 Cal.3d at p. 167.) In essence, the Supreme Court rejected the concept that a lawsuit, which conveyed a cautionary message to a defendant about its conduct, was sufficient to satisfy the significant public benefit requirement.

Moreover, in *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629 (*Flannery*), the court of appeal, in reversing an award of attorney fees, stated as follows:

"Here, the trial court found that plaintiff's lawsuit necessarily conferred a significant benefit on a large class of persons because it sent a message to the CHP and other government agencies that sexual discrimination, sexual harassment, and retaliation in violation of the FEHA will not be tolerated. Plaintiff reiterates that rationale for the fee award in this appeal, urging that each time an important right affecting the public interest is enforced, a benefit is conferred on the public in that future wrongdoers are warned that enforcement is not an empty threat. Carried to its logical conclusion, the reasoning adopted by the trial court and espoused by plaintiff would make the private attorney general doctrine applicable in every case in which a plaintiff successfully sued a public agency for some wrongful conduct, because every such lawsuit would

communicate a message to the losing party. Such an expansive reading of the statutory requirement is untenable.

"*While plaintiff's lawsuit was based on the important right to be free from unlawful discrimination, its primary effect was the vindication of her own personal right and economic interest. The evidence does not support the trial court's finding that the lawsuit conferred a significant benefit on the general public or on a large class of persons within the meaning of section 1021.5, and the fee award cannot be upheld based on that statute*." (*Flannery*, *supra*, 61 Cal.App.4th at pp. 636-637, italics added.)

Notwithstanding the cases cited above, plaintiff argues that the trial court did not abuse its discretion in granting the attorney fees motion because (1) under the Act, the trial court is authorized to "'render appropriate injunctive or other extraordinary relief to remedy [a] violation and to <u>prevent future violations</u> of a like or similar nature.' ([E]mphasis added[.])[;]" and (2) "the deterrent effect of the remedy is not a consideration in FEHA claims[,]" as discussed in Flannery, *supra*. We find plaintiff's argument to be a difference without a distinction. Regardless of whether deterrence was a factor in granting relief to plaintiff in this case, the analysis remains the same – that there was no general benefit to the public.

We find support for our position in *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506 (*Labio*). *Labio*, as in this case, analyzed whether a public entity violated the Act in its investigation of a police officer. There, a court of appeal affirmed the trial court's refusal to award attorney fees under section 1021.5:

"Although Officer Labio requested attorney's fees in the trial court, the court did not address the issue. We infer from its silence that it determined attorney's fees were not warranted. We review that decision for abuse of discretion. (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 77, [49 Cal.Rptr.2d 348].) We find no abuse of discretion. *Officer Labio did not establish an important right that benefited a large class of persons. Instead, he sought to exercise a right already established for his personal benefit*." (*Labio*, *supra*, 47 Cal.App.4th at p. 1518, italics added.)

Similar to the cases discussed above, the record in this case is clear: plaintiff was pursuing his own personal interest in getting reinstated with the police department because the City violated the Act (i.e., "a right already established for his personal benefit"), and that plaintiff, like the plaintiff in *Labio*, "did not establish an important right that benefited a large class of persons." (*Labio*, *supra*, 47 Cal.App.4th at p. 1518.) Therefore, we simply fail to see how the "public benefit" requirement under section 1021.5 was established in this case.

Consequently, we hold that the trial court abused its discretion in awarding plaintiff attorney fees under the private attorney general statute of section 1021.5.

II. Defendant Has Waived His Argument Under Government Code Section 3309.5, Subdivision (C)(1)

In his response brief, plaintiff argues for the first time that "the trial court has authority to issue an award of attorneys fees under Govt. Code section 3309.5(C)(1)." Hence, plaintiff contends that even if we hold that the trial court erred in awarding fees

under section 1021.5, "it is still appropriate under Govt. Code Section 3309.5(c)(1). [Citation.]"

Plaintiff, however, failed to raise this argument before the trial court. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations .]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117. We hold that plaintiff waived his right to make this argument by failing to present it to the trial court.

DISPOSITION

The order awarding attorney fees is reversed. The City shall recover its costs on appeal.

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/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P. J.

/s/ Richli
J.